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Supreme Court of the United States

October Term, 1953.

No. 27.

S. G. OLBERDING, Doing Business As VESS TRANSFER COMPANY and CHARLES DARNELL, - - - Petitioners,

versus

ILLINOIS CENTRAL RAILROAD COMPANY, - - - - - - - - Respondent,

---

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

RESPONDENT'S BRIEF.

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No. 27.

S. G. OLBERDING, DOING BUSINESS AS VESS TRANSFER COMPANY AND CHARLES DARNELL, - - - - - - - *Petitioners,*

v.

ILLINOIS CENTRAL RAILROAD COMPANY, - *Respondent.*

RESPONDENT'S BRIEF.

STATEMENT OF CASE.

In April, 1951, the petitioner, Darnell, as agent and employee of the petitioner, Olberding, drove a tractor and flat-bed trailer, on which was loaded a bulldozer shovel against an overhead bridge of the respondent railroad company in McCracken County, Kentucky. The force of the collision was sufficient to knock respondent's bridge and tracks out of line, thus causing the derailment of one of respondent's trains shortly thereafter. This was not a single isolated use of Kentucky Highways by the petitioners as owner and driver respectively of the truck. This was the third trip from Louisville to Paducah, hauling machinery for the same shipper (R. 28, 29). After

the accident the driver went back to Louisville to get another Caterpillar and take it to Evansville (R. 30). In an action for damages in the District Court for the Western District of Kentucky, respondent recovered verdict and judgment for $37,500.00.

Summons issued by the Clerk of the District Court for the Western District of Kentucky, was directed to the United States Marshal for the Eastern District of Kentucky, and by him served on the Secretary of State at Frankfort, Kentucky, in accordance with the provisions of *K. R. S. 188.020* and *188.030*, providing for service on non-resident motorists in actions arising out of accidents on the highways of the State. The Statutes which will be quoted are similar to those enacted in the majority of the States, providing in substance that a non-resident motorist who accepts the privilege of using the highways of the State, makes the Secretary of State his agent for service of process in a civil action for negligence resulting in an accident or collision in the State. The opinion of the court below is reported in 201 F. 2d 582. It appears to us that the principal, if not the sole, question presented by petitioners is this:

> Did the petitioners, residents of Indiana, by operating a motor vehicle on the highways of the State of Kentucky, waive the venue provisions of Title 28, Sec. 1391(a) U. S. C. A. and consent to be sued in United States District Court, in an action to recover damages resulting from negligence in such operation?

SUMMARY OF ARGUMENT.

I.

This action for damages was filed in the District Court of the Western District of Kentucky, the District in which the alleged negligent operation of the motor vehicle occurred. Process issued by the Clerk of that Court was directed to the United States Marshal for the Eastern District of Kentucky, where Frankfort, the capitol of the State, is located. There it was served by the Marshal on the Secretary of State, in accordance with the provisions of *K. R. S. 188.020* and *188.030*. Such service was sufficient to bring before the court the non-resident defendants, owner and operator respectively of the motor vehicle involved in the collision and accident.

II.

By the operation of a motor vehicle on the highways of the State of Kentucky, petitioners made the Secretary of State their agent for service of process in this action, and waived the venue provisions of *Title 28, Sec. 1391 (a) U. S. C. A.* The application of the doctrine of *Neirbo Company* v. *Bethlehem Shipbuilding Corporation*, 308 U. S. 165, 60 S. Ct. 153, to this situation is reasonable and supported by the weight of authority.

III.

The venue of actions in the Federal courts is governed by the Federal Statutes. The Kentucky cases cited by petitioners do not support their position.

ARGUMENT.

I.

In an action for damages brought against non-resident motorists in United States District Court for the Western District of Kentucky under the authority of K.R.S. 188.020 and 188.030, process directed to the United States Marshal for the Eastern District of Kentucky, and served by him on the Secretary of State would bring such non-residents before the Court.

Chapter 188 of the Kentucky Revised Statute is set out under the following caption:

"NON-RESIDENT MOTORISTS—SERVICE OF PROCESS ON". The following sections of the Chapter are relevant:

> "188.020 (12-1) NONRESIDENT OWNER OR OPERATOR OF MOTOR VEHICLE MAKES SECRETARY OF STATE PROCESS AGENT. Any nonresident operator or owner of any motor vehicle who accepts the privilege extended by the laws of this State to nonresidents to operate motor vehicles or have them operated within this State shall, by such acceptance and by the operation of such motor vehicle within this State, make the Secretary of State his agent for the service of process in any civil action instituted in the courts of this State against the operator or owner arising out of or

by reason of any accident or collision or damage occurring within this State in which the motor vehicle is involved."

"188.030 (12-2) SERVICE OF SUMMONS AND PETITION IN ACTION AGAINST NONRESIDENT MOTORIST. The Clerk of the Court in which the action is brought shall issue a summons against the defendant named in the petition and direct it to the sheriff of Franklin County. The sheriff shall execute the summons by delivering a true copy to the Secretary of State and shall also deliver with the summons an attested copy of plaintiff's petition. The Secretary of State shall immediately mail the copy of the summons and petition to the defendant at the address given in the petition. The letter shall be posted by prepaid registered mail and shall bear the return address of the Secretary of State. The sheriff shall make the usual return to the court, and in addition the Secretary of State shall make a return to the court showing that the acts contemplated by this statute have been performed, and shall attach to his return the registry receipt, if any. Summons shall be deemed to be served on the return of the Secretary of State and the action shall proceed as provided in the Rules of Civil Procedure. (1952, c. 84, Sec. 64; effective July 1, 1953)."

"188.060 (12-5) OTHER METHODS OF SERVING PROCESS NOT AFFECTED. This chapter extends the right of service of process upon nonresidents, and does not limit any other provisions for the service of process."

The question involves the consideration of the following Rules of Civil Procedure:

RULE 4. PROCESS.

"(c) BY WHOM SERVED. Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely when substantial savings in travel fees will result."

"(d)(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process."

"(d) (7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summonsor or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

"4. (f) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides,

beyond the territorial limits of that state. A Subpoena may be served within the territorial limits provided in Rule 45."

In the case of *Mississippi Publishing Company* v. *Murphree*, 326 U. S. 438, 66 S. Ct. 242, a resident of the Northern District of Mississippi filed action in that District to recover damages for libel against a Delaware corporation, having an office and place of business in the Southern District of Mississippi. The action was begun by service of summons in the Southern District by the United States Marshal upon the agent designated by the corporation to receive service of process within the State. The court considered the question of venue and the sufficiency of the service. On the question of venue, the court referred to and followed the doctrine of *Ex Parte Schollenberger*, 96 U. S. 369, and *Neirbo* v. *Bethlehem Shipbuilding Corporation*, 308 U. S. 165. The court stated that the consent to suits in the Federal courts was a consent to suits brought in conformity to Federal regulations governing jurisdiction, venue and procedure of those courts. We quote from the opinion:

"The question remains whether Rule 4(f) is an effective means of bringing the petitioner before the district court in the northern district where the suit was properly brought in conformity to Section 51 of the Judicial Code. The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency. But in ascertaining their

meaning the construction given to them by the Committee is of weight. Rule 4(f), as explained by the authorized spokesmen for the Advisory Committee, see Proceedings of Washington and New York Institute on Federal Rules, 291, 292; Proceedings of The Cleveland Institute on the Federal Rules, 205, 206, was devised so as to permit service of process anywhere within a state in which the district court issuing the process is held and where the state embraces two or more districts. It was adopted with particular reference to suits against a foreign corporation having an agent to receive service of process resident in a district within the state other than that in which the suit is brought. It was pointed out that the rule did not affect the jurisdiction or venue of the district court as fixed by the statute, but was intended among other things to provide a procedural means of bringing the corporation defendant before the court in conformity to its consent, by serving the agent wherever he might be found within the state. See also Hughes, Federal Practice, Vol. 17, Sec. 18093; Moore, Federal Practice, Vol. 1, p. 360-361."

The court held that the service was sufficient. The application of Rule 4 to such service is consistent with the purpose of permitting freedom and flexibility of procedure in giving defendants notice of the filing of the action. The procedure outlined in the statute is available in the Federal courts. The rule has been followed by lower courts in well considered cases.

"In action for injuries sustained in collision within Western District of Louisiana with auto-

mobile owned by nonresident, service of process upon automobile owner's nonresident liability insurer through its statutory agent for service of process, the Secretary of State, was valid though Secretary of State was domiciled in the Eastern District, where he was served by marshal of that district. Federal Rules of Civil Procedure, rule 4(f), 28 U. S. C. A. following section 723c."

Cheshire et ux. v. Car & General Insurance Corp., et al., 4 F. R. D. 353.

In the case of *Townsend* v. *Fletcher, et al.*, Northern District of Ohio, 9 F. R. D. 711, a summons was apparently served, as in this action, under the authority of a similar State statute. The service was upheld. See also *Morris* v. *Sun Oil Company, et al.*, D. C. Maryland, 88 F. Supp. 529.

II.

By the operation of a motor vehicle within the State of Kentucky, the non-resident petitioners waived the venue provisions of *Title 28, Section 1391(a), U. S. C. A.*

Section 1391(a), Title 28, U. S. C. A., is as follows:

"(a) A civil action wherein jurisdiction is founded only on a diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

Respondent contends that this question is controlled by the doctrine of *Neirbo* v. *Bethlehem Shipbuilding Corporation*, 308 U. S. 165, and the numerous well considered cases in which that doctrine has been applied in actions similar to this. In the Neirbo case,

the court held that a foreign corporation's designation of an agent for the service of process, as required by the law of a State constituted consent to be sued in a Federal court for that State in effect waiving the provisions of the above quoted statute as to venue. We quote from the opinion:

> "The classic doctrine was that a corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty.' Bank of Augusta v. Earle, 13 Pet. 519, 588, 10 L. Ed. 274. Logically applied, this theory of non-migration prevented suit in a non-chartering state, for the corporation could not be there. And such was the practice of the circuit courts until the opinion of Chief Justice Waite in Ex parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853, displaced metaphor with common sense. The essential difference between the practice which Mr. Justice Nelson initiated at circuit and the decision in Schollenberger's case was not a matter of technical legal construction, but a way of looking at corporations. Men's minds had become habituated to corporate activities which crossed state lines. The fact that corporations did do business outside their originating bounds made intolerable their immunity from suit in the states of their activities. And so they were required by legislatures to designate agents for service of process in return for the privilege of doing local business. That service upon such an agent, in conformity with a valid state statute, constituted consent to be sued in the federal court and thereby supplanted the immunity as to venue, was the rationale of Schollenberger's case."

The court considered fully the elimination in the Act of 1937 of the words "in which he shall be found" from the Act of 1875. In spite of this change, the Federal courts continue to apply the doctrine of *Ex Parte Schollenberger*, 96 U. S. 369, until *Southern Pacific* v. *Denton*, 146 U. S. 302. The Denton case is distinguished because the Texas statute involved, required the corporation as a condition precedent to obtain a permit to do business within the State to surrender the right of removal to the Federal courts. This action was unconstitutional and void, and it could give no validity to any action of the corporation in obedience to its provisions. It is also pointed out in the Neirbo opinion that by finding an actual consent to be sued, the court was not subjecting Federal procedure to the requirements of New York law, but finding, in substance, that the consent of a party, in accordance with State statutes, could result in a situation authorizing the Federal courts to take cognizance of a case. The doctrine is entirely consistent with the Schollenberger case, and the holdings of *Kane* v. *New Jersey*, 242 U. S. 160, 37 S. Ct. 30, and *Hess* v. *Pawloski*, 274 U. S. 352, 47 S. Ct. 632. These earlier cases not only establish the constitutionality of such State statutes as within the power of the State to regulate the use of highways, but they also apply the doctrine of implied consent in proceedings growing out of accidents on the highways. It is expressly stated in Hess v. Pawloski that the difference between formal and implied consent is not substantial so far as con-

cerns the application of the due process clause. The doctrine of implied consent was recognized by the Fourth Circuit in *Knott Corporation* v. *Furman*, 163 F. 2d 199. That was an action by Mary Hale Furman, a citizen of Massachusetts against The Knott Corporation, a Delaware corporation, for injuries sustained in the course of a fire which damaged a hotel in Virginia, in which plaintiff was a guest. The question of venue was fully considered under a State statute, which not only required a foreign corporation to designate a process agent, but expressly provided that if such company should do business in Virginia without having expressly appointed the Secretary of the Commonwealth as its agent, it would be deemed to have made such appointment by doing business in the State. The court upheld this provision, stating that the statute was of a highly remedial nature and should be liberally construed. Following and quoting from the Neirbo case, the court held that such appointment of an agent waived the provisions of the federal venue statute. The court also followed the reasoning of the Neirbo case in this language:

> "To hold that it should be given effect for one purpose but not for the other would not only be illogical but would result in the anomaly of permitting the defendant to be sued in the state but not in the federal courts, although all the elements of federal jurisdiction are present and although defendant would itself have the right to remove the case into the federal court if sued in the courts of the state."

The authority and soundness of the reasons for the Neirbo decision seem to make it applicable to actions arising under nonresident motorist statutes. The following is quoted from the opinion of the District Court of the Western District of Michigan, from *Archambeau v. Emerson*, 108 F. Supp. 28:

> "Venue is a personal privilege which may be either expressly or impliedly waived by a defendant. Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd., 308 U. S. 165, 60 S. Ct. 153, 84 L. Ed. 167; Commercial Casualty Ins. Co. v. Consolidated Stone Co., 278 U. S. 177, 49 S. Ct. 98, 73 L. Ed. 252; Knott Corporation v. Furman, 4 Cir., 163 F. 2d 199; Morris v. Sun Oil Co., D. C., 88 F. Supp. 529; Steele v. Dennis, D. C., 62 F. Supp. 73. In Lee v. Chesapeake & Ohio Railway Co., 260 U. S. 653, 43 S. Ct. 230, 231, 67 L. Ed. 443, the court said in referring to the provisions of the old Judicial Code, Judicial Code, Sec. 51, 28 U. S. C. A., Sec. 112, defining general jurisdiction of the district courts and the provisions relating to venue of suits:
>
> > 'It is a necessary conclusion from repeated decisions, going back to the original Judiciary Act of 1789 that this provision does not limit the general jurisdiction of the District Courts or withdraw any suit therefrom, but merely confers a personal privilege on the defendant, which he may assert, or may waive, at his election.'"

The Michigan statute is similar to the Kentucky statute. The above is only one of the many cases growing out of automobile accidents based on the hold-

ing in the Neirbo case. See *Urso* v. *Scales, et al.*, E. D. Pa., 90 F. Supp. 653; *Steele* v. *Dennis*, Md., 62 F. Supp. 73; *Krueger* v. *Hider*, E. D. South Carolina, 48 F. Supp. 708; *Burnett* v. *Swenson*, W. D. Okla., 95 F. Supp. 524; *Andrews* v. *Joseph Cohen & Sons*, S. D. Texas, 45 F. Supp. 732. It has been argued that the Neirbo case applies only to corporations. Such arguments have been disallowed. Krueger v. Hider *supra*.

The petitioners reply, of course, on Martin v. Fischbach Trucking Company, CA 1, 183 F. 2d 53, and one District Court case following it. We refer to Waters v. Plyborne, 93 F. Supp. 651. The later case of *McCoy* v. *Siler*, CA 3, 205 F. 2d 498, appears to have been decided by the same judge who decided the Fischbach case, Judge Maris. Circuit Judge Goodrich follows the Fischbach doctrine. Judge Biggs, Chief Judge of that court, dissents, following the Neirbo and Schollenberger cases. He concludes his opinion as follows:

> "I do not agree with the reasoning or the conclusion in Martin v. Fischbach Trucking Company, First Circuit, 1950, 183 F. 2d 53. I agree with the conclusion reached in Olberding v. I. C. Railroad, 6th Circuit, 1953, 201 F. 2d 582."

The practical usefulness and necessity of the Neirbo doctrine is obvious. In considering the conflict presented on this appeal, we find no good reason why the same rule should not be applied to cases based on the nonresident motorist statutes. It would seem that every practical sound reason suggests the holding that

such motorists have consented to be sued under circumstances similar to those existing in this case.

III.

Venue of actions in Federal Courts is governed by Federal statutes.

In the action of *Dan Cohen Realty Company* v. *National Savings and Trust Company*, 36 F. Supp. 536, affirmed 125 F. 2d 288, on the authority of *Chase* v. *Wetzlar*, 225 U. S. 79, which he cited, District Judge Ford wrote as follows:

> "Assuming the analogy between the two types of cases to be complete, it does not follow that the procedural rules of the State governing the venue of State Courts in respect to such actions are controlling upon the question under consideration. Venue of actions in the Federal courts is governed by the Federal Statutes, and 'the power which a state court may exert in a particular contingency affords no basis for the assumption that the act of Congress extends to a subject which the language of the act does not embrace.' Chase v. Wetzlar, 225 U. S. 79, 89, 32 S. Ct. 659, 663, 56 L. Ed. 990."

To the same effect see *Woodard* v. *Mutual Life Insurance Company of New York*, W. D. La., 59 F. Supp. 452, from which we quote the following:

> "Taking up now the cases cited by defendant's counsel, first in connection with the contention that decisions of the state court are binding upon us

> under Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, it must be remembered that the matters of jurisdiction and venue of the Federal Courts are controlled by national statutes and decisions and can not be affected by those of the state. Cyc. Fed. Proc. 2d p. 174; Mechanical Appliance Co. v. Castleman, 215 U. S. 437, 30 S. Ct. 125, 54 L. Ed. 272; Carby v. Greco, D. C., 31 F. Supp. 251, and authorities cited."

It seems to us that the Kentucky cases cited by petitioners have no application. As indicated in the Neirbo case, State legislation may bring about a situation which enables the Federal courts to take cognizance of a case. Nevertheless, the effect on venue is a matter of Federal, not State, law. Petitioners misconstrue the doctrine of the Kentucky cases of Henry Fisher Packing Company v. Mattox, *et al.*, 262 Ky. 318, 90 S. W. 2d 70, and Kennedy v. Lee, 272 Ky. 237, 113 S. W. 2d 1125. Prior to 1942 the Kentucky nonresident motorist statute attempted to fix the venue of an action filed thereunder either in the County where the loss or accident occurred, or in the County where the plaintiffs, or one of the plaintiffs resided. Section 74 of the Kentucky Civil Code, now K. R. S. 452.460, provided that actions for injury to the person or property of the plaintiff should be brought in the County in which the defendant resided, or in which the injury was done. In the Mattox case, our Court of Appeals held that so much of the statute as permitted the action against a nonresident motorist to be brought in

the County in which the *plaintiff* resided was unconstitutional, because it discriminated against the nonresident motorist. In a revision of the Kentucky Statutes in 1942, the unconstitutional provision was eliminated.

The isolated statement in the case of *Kennedy* v. *Lee*, 272 Ky. 237, 113 S. W. 2d 1125, that the nonresident motorist act was purely a process statute does not seem to aid petitioners in their contention. The Court of Appeals decided that an action by a resident of Kentucky against a nonresident arising out of the operation of an automobile on the highways of the State could only be instituted in the County where the accident occurred, and that process issued in a County other than that in which the accident occurred would not bring the defendant before the court. As indicated above we think these Kentucky cases do not affect a question of venue under Federal law. We have referred to them briefly, however, to show that they do not strengthen the position of petitioners.

CONCLUSION.

It has been held that no legal distinction should be drawn between a nonresident's express consent to suit and waiver of venue by the designation of a process agent, and such nonresident's implied consent and waiver by doing business in the State. On the sound authority of the Neirbo case, many courts have applied this rule, holding that a nonresident gave consent to be

sued and waived venue under State statutes regulating nonresidents' use of State highways. A contrary conclusion would not only limit the effectiveness and thwart the policy of such statutes, but would discriminate in favor of nonresidents, permitting them to remove cases to the Federal court, though they could not be sued there. The better reasoning supports the application of the Neirbo doctrine to cases arising under the nonresident motorist statutes.

Respectfully submitted,

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